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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 737

IRVING NAPUE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinions of the court of appeals (Pet. App. 1-30) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1968. A petition for rehearing was denied on October 14, 1968. The petition for a writ of certiorari was filed on November 13, 1968. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a delay of less than four months between the date of the offense and petitioner's arrest and a subsequent delay of two and a half months before indictment constituted a deprivation of due process.

2. Whether, in the circumstances of this case, petitioner was prejudiced by the fact that the testimony of the agent who testified before the grand jury was not recorded.

3. Whether the instruction as to petitioner's prior conviction was proper.

4. Whether the trial court's refusal to grant petitioner's request for instructions on mistaken identification amounted to reversible error.

STATEMENT

1. Petitioner was arrested on March 30, 1965 in connection with a sale of narcotics on December 7, 1964 (R. 20; Tr. 6).[1] A two-count indictment, returned in the Northern District of Illinois on June 17, 1965, charged petitioner with selling heroin not pursuant to a written order form, in violation of 26 U.S.C. 4705(a), and concealing narcotics in violation

[1] "R." denotes the record in the court below; "App." refers to the appendix of petitioner in the court below; and "Tr." denotes the three volume transcript of the trial proceedings, copies of which have been previously lodged with the Clerk of this Court.

of 21 U.S.C. 174 (R. 21). On January 25, 1966, a superseding indictment with an additional concealment count was returned (R. 6-9). Petitioner was convicted on one count of concealing narcotics and was sentenced to six years' imprisonment.[2] The court of appeals affirmed, one judge dissenting (Pet. App. 1-30).

2. The government's evidence disclosed that on December 7, 1964, Agent Tucker of the Bureau of Narcotics, with an informant, Cathy Bullock, went to the residence of Mrs. Howell where they were escorted to the basement (Tr. 6-9). While they were there the doorbell rang. Agent Tucker gave Mrs. Howell $375 and discreetly followed her upstairs. Through a half-opened door, he observed Mrs. Howell speaking to petitioner approximately twenty feet away in a portion of the entranceway that "was kind of lighted up." He saw petitioner hand Mrs. Howell a plastic bag and overheard petitioner state, in response to an inquiry about the quality of the narcotics, that "it is good" (Tr. 9-11, 30, 32, 34). Tucker then returned to the basement. When Mrs. Howell arrived, she turned over the bag containing heroin to Tucker (Tr. 12, 35-36). Agents Defauw and Meyer corroborated Tucker by testimony that, at the pertinent time, petitioner left his house, travelled to Mrs. Howell's residence, entered the front entrance and, after briefly remaining inside,

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[2] Prior to trial count three was dismissed on motion of the government (App. at III Docket Entries) and at trial petitioner's motion for judgment of acquittal was granted with respect to the first count laid under Section 4705(a) (Tr. 142, 163-164).

walked to his cab and returned home (Tr. 46-64, 70-73). Each agent identified the individual that he had surveilled as petitioner (Tr. 62-64, 70, 73).

3. On cross-examination, each of the agents testified that he did not believe that he had testified before the grand jury in this case (Tr. 40, 67, 68, 74). No request for the production of Agent Tucker's or Agent Defauw's testimony was addressed to the trial court. Following direct examination of Agent Meyer, defense counsel moved for production of the agents' grand jury testimony. During a lengthy colloquy, counsel for the government informed the court that he did not possess any transcript of the agents' testimony and did not know whether the agents had testified before the grand jury. He argued that, in any event, petitioner had failed to demonstrate any "particularized need." The trial court denied the motion (Tr. 84-104). The motion was renewed twice thereafter and similarly denied (Tr. 135-138, 143).[3] Pursuant to an order of the court of appeals (see Pet. App. at 15), the United States Attorney examined the minutes of the grand juries that returned the indictments in this case and ascertained that Agent Tucker was the only one of the three witnesses who had testified before the grand jury and that his testimony had not been recorded (Pet. App. at 16).

4. Petitioner testified that he could not recollect his whereabouts on December 7, 1964, but denied ever

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[3] Government counsel was, on two occasions, informally requested by the court to examine the grand jury minutes to ascertain whether the agents had testified, but apparently never did so.

having engaged in a narcotic transaction with Mrs. Howell or ever having been to her home (Tr. 109-113).

ARGUMENT

1. Petitioner was arrested and apprised of the charges against him less than four months after the offense—as soon as the need to protect the identity of the undercover agent ceased.[4] Thus, there is no basis for the claim that the delay between the offense and arrest was unreasonable. There is no conflict between the decision below and rulings of the District of Columbia Circuit. (See *e.g.*, *Ross* v. *United States*, 349 F.2d 210 (C.A.D.C.); *King* v. *United States*, 369 F.2d 213 (C.A.D.C.), certiorari denied, 387 U.S. 910; *Woody* v. *United States*, 370 F.2d 214 (C.A.D.C.)). The majority opinion below specifically reaffirmed the previously articulated position of the Seventh Circuit in *United States* v. *Deloney*, 389 F.2d 324, 325, certiorari denied, 391 U.S. 904, that pre-indictment "delay less than the period of the Statute of Limitations [could] be so unreasonable and the prejudice to defendants so great, that relief under the Fifth Amendment should be afforded." It found, however, the delay here not to be unreasonable (Pet. App. at 17-22). Similar rulings have been made in the District of Columbia. The *Ross* opinion, itself, intimated that a delay of four months or less before apprising the defendant of the charges would be permissible. See 349 F.2d at 213, 215. See, also *Bey* v. *United States*,

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[4] The need to protect the informant terminated upon her murder (Tr. 93).

350 F.2d 467 (C.A.D.C.), certiorari denied, 385 U.S. 905 (three and one-half month delay); *United States* v. *Godfrey*, 243 F. Supp. 830 (D.D.C.) affirmed, *per curiam*, 358 F.2d 850 (C.A.D.C.) (four month delay); *Worthy* v. *United States*, 352 F.2d 718 (C.A. D.C.), vacated on other grounds, 384 U.S. 894 (four month delay). In *Worthy* the Court held that a delay of less than four months would not be considered "as of the order necessitating inquiry into the reasonableness of the conceded police purpose to protect the identity of its undercover officer." *Worthy* v. *United States*, *supra*, 352 F.2d at 719.

Similarly, the two and a half-month delay between arrest and indictment in no way violated petitioner's rights. The government is entitled to a reasonable time in which to prepare its case. *United States* v. *Panczko*, 367 F.2d 737, 738-739 (C.A. 7), certiorari denied, 385 U.S. 1009; *Crow* v. *United States*, 323 F.2d 888, 890-891 (C.A. 8); cf. *Beavers* v. *Haubert*, 198 U.S. 77, 87; *United States* v. *Ewell*, 383 U.S. 116, 120.

2. Petitioner was not unreasonably prejudiced by the fact that only one agent testified before the grand jury and his testimony was not transcribed.[5] There is no proof and no reason to believe that the failure to record the testimony was an attempt to circumvent

[5] The Seventh Circuit ruled in *United States* v. *Amabile*, 395 F.2d 47, certiorari pending No. 129, this Term, that, from the date of that decision, where grand jury transcripts of the testimony of a witness exist, they should automatically be turned over to the defense at the conclusion of the direct examination.

the decision in *Dennis* v. *United States*, 384 U.S. 855. It is more likely that the testimony was not transcribed [6] because the substance thereof was embodied in the agents' reports which were handed over to defense counsel at the outset of his cross-examination of the witnesses (Tr. 35-36). Since the agents testified at trial and their reports were available, there was no particular need for the grand jury testimony of Agent Tucker.

3. During petitioner's direct examination, defense counsel elicited that petitioner had been discharged from a Post Office job because of a false statement contained in his job application blank relating to whether he had previously been arrested. Petitioner explained that he had thought that the form sought to ascertain whether he had been convicted of any crimes and had answered "no" (Tr. 114-116). On cross-examination, petitioner admitted that he had been convicted in connection with the false statement in the application, but stated that he was innocent of the charge (Tr. 121-122). In its final charge, the trial court gave the standard instruction that a prior con-

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[6] Rule 6(d), of the Federal Rules of Criminal Procedure, permits but does not require that the testimony of witnesses before the grand jury be transcribed. See *United States* v. *Caruso*, 358 F.2d 184 (C.A. 2), certiorari denied, 385 U.S. 862; *United States* v. *Labate*, 270 F.2d 122, 123-124 (C.A. 3), certiorari denied *sub nom. Sussman* v. *United States*, 361 U.S. 900; *United States* v. *Hensley*, 374 F.2d 341 (C.A. 6), certiorari denied, 388 U.S. 923; *Thompson* v. *United States*, 381 F.2d 664 (C.A. 10); *Campbell* v. *United States*, 368 F.2d 521 (C.A. 10); *United States* v. *Cianchetti*, 315 F.2d 584 (C.A. 2); *United States* v. *Mason*, 277 F. Supp. 114, 116 (W.D. Missouri).

viction does not render a witness incompetent to testify, but that the conviction may be considered as it reflects upon his credibility (Tr. 207-208).

Petitioner attacks this instruction as in conflict with *Luck* v. *United States*, 348 F.2d 763 (C.A.D.C.) and *Brown* v. *United States*, 370 F.2d 242 (C.A. D.C.). Those decisions, however, dealt, not with instructions to the jury, but with the failure of the trial court to exercise appropriate discretion under the District of Columbia Statute (14 D.C. Code 305) in determining when prior convictions could be admitted for the purpose of impeachment. Here petitioner did not request the court to bar the government from impeaching petitioner on the basis of the conviction (see 18 U.S.C. 1001). He could not properly have done so since defense counsel initially opened up the question of petitioner's discharge from his Post Office job. Thus, even under the District of Columbia rule, the trial court's admission of the conviction for impeachment purposes would not have constituted error. See *Jones* v. *United States*, No. 21,381 (C.A.D.C.), opinion entered September 3, 1968, slip op. at 7; *Gordon* v. *United States*, 383 F.2d 936, 939 (C.A.D.C.); certiorari denied, 390 U.S. 1029, *Hood* v. *United States*, 365 F.2d 949 (C.A.D.C.).[7] With the fact of conviction thus properly in evidence, the judge was under a duty to tell the jury the purpose for which such testimony could be considered. Moreover, since the conviction

[7] While it was not explicitly developed in the record that the conviction was for a felony, it would be evident to a federal judge that prosecution for a false statement to the Post Office Department would be under 18 U.S.C. 1001.

was for making a false statement, it was particularly relevant to petitioner's credibility.

4. Prior to the commencement of closing arguments, petitioner presented a number of requested instructions to the court, including two relating to mistaken identity. Government counsel objected to the giving of the instructions and the trial court concured, stating that the instructions were "argumentative" and that he refused "to take one piece of evidence in the case and single that out for particular attention" (Tr. 158). Thereafter, both the government (Tr. 195-198, 200) and petitioner (Tr. 176-194) argued the reliability of the identification of petitioner by the agents. The trial court in its instructions did not summarize the evidence and did not include any specific instruction on mistaken identity. Petitioner noted an objection (Tr. 212). The majority of the court below expressed the view that it would have been the better practice for the court to have given some form of mistaken identity instruction, but found no basis for reversal in the failure to give the instruction under the circumstances of this case.

The evidence in the case was simple and brief. Petitioner's defense was simply that he was not present. The sole issue, therefore, was whether petitioner was the person who had visited the Howell home. In short, the claim of mistaken identity was not a separate affirmative defense or even a separate theory of the case, but was in effect a general denial. Since the judge was not summarizing the government's evidence, he could reasonably feel that there was no reason to give a separate charge relating to defendant's

denial that he was the person seen. This issue—primarily one of credibility—was adequately framed for the jury through petitioner's cross-examination of government witnesses and the argument of opposing counsel. The trial court adequately explained the government's burden of proof and the factors to be weighed in considering the testimony (Tr. 203-204).[8]

[8] Most of the cases relied upon by petitioner are distinguishable on their facts in that the failure to give the instruction resulted in an unfair charge. None of them supports the proposition that—regardless of the factual nexus in which a case rests—reversible error necessarily arises when a particular instruction is not granted. While *Salley* v. *United States*, 353 F.2d 897 (C.A.D.C.), has laid down, for the District of Columbia, a rule that there should be a charge on mistaken identity in narcotics cases, this was, as the court below pointed out, in the context of local practice where one agent identified a large number of defendants with whom he had had limited contact.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1968.

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PETITION FOR REHEARING

SUPREME COURT, U. S.

NO. 737

FEB 7 1969

JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1968

IRVING NAPUE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

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No. 787

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1938

I

MOTION FOR LEAVE TO FILE BRIEF
OF AMICUS CURIAE AND BRIEF IN SUPPORT
OF PETITION FOR CERTIORARI.

R. EUGENE PINCHAM
CHARLES B. LYNN
PAUL E. STRAVINSKY
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Chicago, Illinois 60637

NO. 737

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1968

IRVING NAPUE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE, CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Petitioner, IRVING NAPUE, pursuant to Rule 58 (2) of the Rules of this Court, respectfully petitions for rehearing of the order entered herein on January 13, 1969 denying the Petition for Rehearing, and assigns the following reasons

No. 777

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

IRVING NAGLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR DIRECTING
OF CERTAIN DESIGNATED PETITION
FOR WRIT OF CERTIORARI.

TO THE HONORABLE, CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES.

Petitioner, IRVING NAGLE, presents to
the (2) of the Rules of this Court, respectfully
petitions for reinstating of the order entered
on January 15, 1951 denying the petition
for Rehearing, and submits the following reasons

in support thereof:

The government in opposition to the granting of the Petition for Rehearing confesses that the trial court committed reversible error, affecting a substantial right of Petitioner, when it refused to instruct the jury on Petitioner's defense and theory of the case - which was mistaken identity of Petitioner by the government witnesses as the person who committed the alleged offense. The government suggests however that the trial court's refusal to so instruct was minimized and balanced by counsels for Petitioner's argument to the jury. If the legal principles requiring the trial court to instruct the jury on the law applicable to a case is to have any meaningful significance in the fact finders' search for the truth, then this argument and contention by the government is utter fallacious. It is indeed ludicrous.

The government in its Memoranda in opposition to the granting of the instant Petition makes no real effort to justify or uphold the majority opinion of the United States Court of Appeals for the Seventh Circuit affirming the instant conviction. Nor does the government make a serious attempt to reconcile the decision of affirmance with the Court's diametrically opposed decisions in U.S. vs. Dichiarinte, 385 Fed. 2d. 333; U.S. vs. Indian Trailer Corp., 226 Fed. 2d. 595, and the United States Court of Appeals for the District of Columbia's decision in Salley vs. U.S., 353 Fed. 2d. 897.

In support thereof:

What the government has here in effect argued is that inasmuch as the government is of the opinion that Petitioner is guilty he therefore is not entitled to the basic and fundamental rights and rules in a judicial determination of his guilt. This is fundamentally unfair, discriminatory and a flagrant violation of due process.

Respectfully prayed and submitted,

R Eugene Pincham

R. Eugene Pincham

I, R. EUGENE PINCHAM, do hereby certify that the above Petition is presented in good faith and not for delay and based upon the government's hereinbefore Answer and Memoranda filed in opposition to the granting of the Petition for Writ of Certiorari, an intervening circumstance of substantial effect to which the Rules of this Court did not permit an answer.

R Eugene Pincham

R. EUGENE PINCHAM